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U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

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DAVID J. HINDS, CLERK

BY
DEPUTY.

Civil Action No. 5:02CV282 (DF)

Jury Trial Demanded

Judge Folsom

Defendants.

MICROSOFT'S MOTION TO DISMISS

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INTRODUCTION

Sendo's Complaint is long on rhetoric, short on facts, and deficient under the law. Sendo's development of the Z100 Smartphone failed not because of any Microsoft "master" or "secret" plan, but because of Sendo's gross incompetence and lack of diligence in creating a competitive product. Microsoft poured millions of dollars and thousands of hours into the creation of the Z100 Smartphone, yet the project never bore fruit because Sendo devoted its attention and resources to the production of its other cell phone lines, and the few employees Sendo did devote to the Z100 were so disorganized and uninterested in the success of the project that it was doomed to failure.

Sendo's competitors eventually beat it to market with superior and cheaper Smartphones that used the same Microsoft software about which Sendo now complains. Instead of redoubling its efforts to produce a competitive product, Sendo cried foul and did what has unfortunately become all too common in this day and age: it initiated litigation as part of a smear campaign, with the hope that it would harm Microsoft in the marketplace while providing a vehicle for discovery into the trade secrets of the companies that beat it to market. In short, Sendo seeks to use this litigation to gain what it could not produce through its own efforts — the technology behind a fully functioning Microsoft Smartphone and the profits that come from successfully bringing a product to market.

Perhaps the best evidence of Sendo's motives in filing this litigation is the vast number of counts in its Complaint which, although they may make for good PR sound bites, have no basis in law and cannot survive a motion to dismiss. For instance, although there are numerous contracts that govern the parties' obligations to each other, Sendo has alleged 12 different tort claims, many of which are barred either by the existence of these contracts or by the

economic loss doctrine. And although the law is clear that the Uniform Trade Secrets Act preempts all common law claims arising from the same set of operative facts as a statutory claim for misappropriation of trade secrets, Sendo alleges a litany of such common law claims immediately after its statutory claim.

The most remarkable thing about Sendo's Complaint, however, is what it does not say. Despite its length and rhetoric, the Complaint is devoid of even the most rudimentary allegations to support its bald claims that Microsoft misappropriated Sendo's trade secrets or that Microsoft engaged in a massive scheme to defraud. Sendo provides no information about the nature or identity of those supposed trade secrets, and it makes no attempt to identify the who, what, where, when, and why that the law demands from parties alleging fraud claims.

As set forth below, even if Sendo's fanciful allegations are taken as true for purposes of this Motion, this Court should dismiss every count in Sendo's Complaint other than the claim for breach of contract.

ARGUMENT

I. All But Sendo's Breach of Contract Claim Should Be Dismissed As A Matter Of Law.

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss, the plaintiff must "plead specific facts, not mere conclusory allegations," as the court should not accept as true a plaintiff's "conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *see also Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Moreover, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."

Nolen v. Nucentrix Broadband Networks, Inc., 293 F.3d 926, 928 (5th Cir. 2002). Every count in Sendo's Complaint other than the breach of contract claim should be dismissed.

II. Sendo's Claims of Fraud, Negligent Misrepresentation, And Constructive Fraud Are Barred Because The Alleged Misrepresentations At Issue Concern Subjects Governed By The Contracts Between The Parties.

Sendo's claims of fraud (Count V), negligent misrepresentation (Count VII), and constructive fraud (Count XII) should be dismissed because they are all based exclusively on statements that Microsoft allegedly made during and pursuant to the parties' contractual relationship. Such statements cannot give rise to tort liability. If Sendo does not believe that Microsoft held up its end of their bargain, Sendo's only recourse is to sue Microsoft for breach of contract — which, of course, Sendo did. (Count IX, Compl. ¶ 79.) Sendo may not push the contracts aside and convert its breach of contract claims into fraud claims, as it did here in a transparent (and futile) attempt to puff up the perceived magnitude and seriousness of its case. These three tort counts should be dismissed as a matter of law.

A. A Tort Claim Cannot Be Based On An Alleged Misrepresentation Concerning A Subject Governed By A Contract.

For a false statement to give rise to a tort claim by one party to a contract against another, it must be “a misrepresentation that was outside of or collateral to the contract” *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 (8th Cir. 1998). Simply put, there is no tort of “fraud in the performance” of a contract. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1550 (5th Cir. 1984). To allow a tort claim based on an alleged false statement that concerns a subject governed by a contract would be to allow a tort claim that is entirely “duplicative of the breach of contract claim.” *Regency Communications Inc. v. Cleartel Communications Inc.*, 160 F. Supp. 2d 36, 43 (D.D.C. 2001). It would also allow the complaining party, in reliance on a trumped-up “tort” claim, to seek punitive damages for what

is, in substance, a claim of breach of contract, thereby evading the rule that punitive damages are not available for breach of contract. *See Nissho-Iwai*, 729 F.2d at 1550. It is no coincidence that Sendo's complaint requests punitive damages. (Count XI, Compl. ¶ 85.)

Even a cursory review of the contracts and alleged misrepresentations at issue reveals that Sendo is attempting to recast its contract claims as tort claims. Several detailed contracts governed the Microsoft-Sendo relationship. (The contracts are attached as exhibits to the Declaration of Consuelo H. Poth, filed in support of Microsoft's Motion to Transfer.) The Non-Disclosure Agreement set the terms under which the parties exchanged confidential information. The Strategic Development and Marketing Agreement ("SDMA") established each party's role in developing, marketing, and promoting the Z100. The Shareholders' Agreement described Microsoft's investment in Sendo and explained Microsoft's rights and responsibilities as an investor. Various licensing agreements fixed each party's rights to the other's technology. And the Term Credit Agreement dictated when and under what circumstances Microsoft would lend money to Sendo. These contracts, read together, regulate every aspect of the Microsoft-Sendo relationship.

Sendo has, in fact, sued Microsoft for alleged breaches of each of those contracts. (Count IX, Compl. ¶ 79.) Yet Sendo has also sued Microsoft for various alleged misrepresentations related to subjects governed directly by those contracts. For example, Sendo alleges that Microsoft falsely represented that it "could deliver fully functioning software well in advance of the target launch date." (Compl. ¶ 21.) This allegation, which is nothing more than an attempt to evade the SDMA, cannot be the basis of a tort claim. The SDMA explicitly requires Microsoft to deliver its software to Sendo "in a timely manner" (SDMA § 2.2), and if Sendo believes that Microsoft did not fulfill that obligation, Sendo must plead and prove a

breach of contract. *See Nissho-Iwai*, 729 F.2d at 1549, 1550 (dismissing a tort claim based on “false assurances as to when oil would again be available” because a contract governed oil shipments). Microsoft’s alleged statements on subjects governed by any of the contracts between it and Sendo cannot give rise to tort liability.

To take another example from the body of the Complaint, Sendo alleges that Microsoft falsely represented it “would provide significant development support” for the Z100. (Compl. ¶ 22.) This allegation, like the one about the readiness of Microsoft’s software, seeks to evade the SDMA. The SDMA prescribed exactly how much and what kind of development support Microsoft was responsible for providing on the Z100 project. Sendo may not, through clever pleading, transform Microsoft’s contractual obligation to provide specific types of development support into a general promise of “significant development support” in a vacuum. Again, if Sendo is dissatisfied with Microsoft’s development efforts, Sendo must claim — and, in fact, has claimed — breach of contract.

Sendo also offers several “examples” of Microsoft’s alleged misrepresentations in the fraud count of its Complaint, and all of those fraud allegations fail under this principle. First, Microsoft allegedly “promised to provide Sendo with further advances, under the Credit Agreement” (Compl. ¶ 65.) Microsoft’s obligations to lend Sendo money under the Term Credit Agreement are set forth in that contract, and Sendo cannot state a fraud claim by dressing up those contractual obligations. *See Regency*, 160 F. Supp. 2d at 42 (“[The Defendant’s] alleged withholding of . . . funds is behavior directly related to the contract; in fact, it is the specific behavior the contract required . . .”).

Second, Microsoft allegedly misrepresented that its software was “code complete,” which supposedly “duped” Sendo into allowing Microsoft to inspect its laboratory.

(Compl. ¶ 66.) The timely completion of Microsoft's software, as discussed above, is a matter governed by the SDMA, as are visits by Microsoft's engineers to Sendo's laboratory (SDMA § 2.11). *See Bridgestone/Firestone v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir. 1996) (dismissing, on account of a contract between the parties, a fraud claim based on misrepresentations that "were intended to lull [the plaintiff] into a false sense of security and . . . did so to [the plaintiff's] detriment").

Third, Microsoft allegedly misrepresented its intention to have Sendo as its "go to market partner" and the amount of development efforts it made on the software for Sendo. (Compl. ¶ 66.) Again, the SDMA governs Microsoft's development and marketing obligations, and a complaint that fails to "mention[] . . . false promises regarding collateral or extraneous matters" must be dismissed. *See Sudul v. Computer Outsourcing Servs.*, 868 F. Supp. 59, 63 (S.D.N.Y. 1994) (internal quotations omitted).

Fourth, Microsoft allegedly imposed performance milestones on Sendo when Microsoft knew that its own failure to deliver its software would make meeting those milestones impossible. (Compl. ¶ 67.) This is a straightforward allegation for breach of contract — SDMA § 2.2 requires Sendo's schedule to be relaxed if Microsoft causes any delays — without any hint of fraud whatsoever, and thus cannot serve as a basis for a fraud claim.

In sum, three of Sendo's tort claims — fraud (Count V), negligent misrepresentation (Count VII), and constructive fraud (Count XII)¹ — must be dismissed because they are permissible only as claims that Microsoft breached its contractual obligations.

¹ Sendo's negligent misrepresentation and constructive fraud counts contain no substantive allegations of their own. Given that they are "based on the same deficient allegations" as the fraud count, they "too must be dismissed." *See Rolls-Royce Motor Cars, Inc. v. Schudroff*, 929 F. Supp. 117, 124 (S.D.N.Y. 1996).

B. The Economic Loss Rule Bars Sendo's Negligent Misrepresentation And Constructive Fraud Claims.

Sendo's negligent misrepresentation and constructive fraud claims are also barred by the economic loss rule. Under that rule, one party to a contract cannot recover economic losses (that is, losses outside the domain of tort law: injuries to person or property) from another party via tort claims. In short, "economic damages are not recoverable in a cause of action in tort." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 991 (Wash. 1994).² The Washington Supreme Court has explained at length the reason for this rule:

We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. . . . If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. . . . If we held to the contrary, a party could bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations.

Id. at 992-93 (dismissing a negligent misrepresentation claim against a party to a contract); *see also Virginia Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156, 163 (W.D. Va. 1996) (barring a claim of constructive fraud to avoid "emasculat[ing] the economic loss rule").

Sendo obviously is not asserting, in its negligent misrepresentation and constructive fraud counts, any injury to person or property. Instead, Sendo alleges that Microsoft's false statements harmed its business. This is exactly the sort of claim that the economic loss rule is intended to bar. If Sendo suffered any business harm at Microsoft's hands, Sendo must seek recovery — as it is, in fact, seeking recovery — under the various contracts,

² The SDMA and several of the parties' other agreements have valid choice of law provisions selecting Washington law. In addition, under a "most significant contacts analysis," Washington is the forum with the most significant contacts. Texas has no connection to the facts giving rise to this litigation. *See Microsoft's Motion to Transfer; De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1413 (5th Cir.) (1995).

and as prescribed by those contracts,³ that it and Microsoft negotiated to allocate the risks and responsibilities of the Z100 development effort. This Court should dismiss Sendo's negligent misrepresentation and constructive fraud claims.

III. Sendo Failed To Plead Its Fraud Counts With Particularity.

Sendo's Complaint is long on vague allegations of fraud — it is full of tales of Microsoft's "master plan" to dominate the next generation mobile phone market and Microsoft's "secret plan" to use Sendo to achieve such nefarious aims — but very short on the particularity that Rule 9(b) requires. The Fifth Circuit has warned against such complaints: "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997). The proper response to such a complaint is to "apply the rule with force, without apology." *Id.*

Rule 9(b)'s requirements are well known and easy to understand. "[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 177; *see also Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994) (stating that Rule 9(b) requires "the essentials of the first paragraph of any newspaper story, namely the who, what, when, where, and how"). Properly particularized allegations of fraud are required to "provide[] defendants with fair notice of the plaintiffs' claims, protect[] defendants from harm to reputation and goodwill, . . . and prevent[] plaintiffs from filing baseless claims and then attempting to discover unknown wrongs." *Tuchman*, 14 F.3d 1061 at 1067. This last item, as explained earlier, is of special concern in this case.

³ The SDMA expressly provides that a party may not recover consequential damages (including "loss of business profits") or punitive damages, both of which Sendo requests in its Complaint. (SDMA ¶ 6.2.)

The vast majority of Sendo's fraud allegations do not satisfy Rule 9(b)'s requirement of particularity.⁴ Take for example Sendo's allegation that "Microsoft represented to Sendo that the Microsoft Stinger software was virtually complete and that it would deliver fully functioning software which was to be integrated into the Sendo Z100." (Compl. ¶ 18.) Who at Microsoft said this to whom at Sendo? Allegations of fraud must identify individual speakers, not corporations. *See Williams*, 112 F.3d at 179. When and where did this statement take place? Sendo gives no clue. "This lack of specificity stands in contrast to the widespread nature of the conspiracy that [Sendo] attempt[s] to allege." *Id.* at 180.

A lack of detail as to the speakers, the time, and the place pervades allegations of misrepresentations in the Complaint, sampled below:

- "Microsoft agreed that Sendo would be Microsoft's 'go to market partner' and that Microsoft would commit considerable financial and personnel resources to this development project." (Compl. ¶ 20.)
- "Microsoft [made] representations about the readiness of its Stinger software and [about how it] could deliver fully functioning software well in advance of the target launch date." (Compl. ¶ 21.)
- "Microsoft [represented] that (1) Stinger was 'code complete' and that it would be released to manufacturer ('RTM') by June 2001; and (2) Microsoft would provide significant development support for the product." (Compl. ¶ 22.)
- "Microsoft said that Smartphone 2003 was delayed because of a delay in the release of Smartphone 2002, and, as a result, the Microsoft development team needed to focus on development of Smartphone 2003." (Compl. ¶ 37.)

None of these allegations, and none of the other, similar allegations in Sendo's complaint, is pleaded with particularity. Sendo's fraud claims should be dismissed.

⁴ The Court should dismiss on this basis not only Sendo's fraud count and its fraudulent inducement count, but also its claims for negligent misrepresentation (Count VII) and constructive fraud (Count XII). *See Williams*, 112 F.3d at 177 (applying Rule 9(b) to claims of negligent misrepresentation that are based on the same alleged misrepresentations as the fraud claims).

Sendo's failure to plead fraud with particularity takes on special importance in connection with its fraudulent inducement count. There, Sendo alleges that Microsoft made false representations to induce Sendo to enter into all of the contracts between them. (Compl. ¶ 89.) The last of those contracts, the Term Credit Agreement, was signed in February of 2002. (Compl. ¶ 28.) This Court should note that the only two allegations of misrepresentations that could possibly have been pleaded with particularity concern statements made several months later, in May of that year. (Compl. ¶¶ 33, 36.) Not one of the allegations relating to statements prior to February of 2002 — that is, prior to all of the contracts — is pleaded with particularity, and Sendo has therefore completely failed to justify its claim of fraudulent inducement with respect to any of the contracts, much less all of them. This Court should dismiss Sendo's fraudulent inducement claim.

IV. Sendo Has Failed To Put Microsoft On Notice Of The Nature Of Its Trade Secret Misappropriation Claims.

Glaringly absent from Sendo's 27-page Complaint is the mention of any facts, details, or information about the nature or identity of the trade secrets Microsoft allegedly misappropriated. In fact, as Sendo admits in its Motion for Leave to Conduct Limited Expedited Discovery Prior to Rule 26 Conference, Sendo has no idea whether any of its trade secrets have been misappropriated, let alone which ones may have been misappropriated.⁵ (Mot. for Expedited Discovery at 5.) Under these egregious circumstances, this Court should dismiss Sendo's misappropriation claims because they fail even to provide Microsoft with notice of Sendo's claims.

⁵ In that Motion, Sendo claims that it requires expedited discovery in order "to determine which of its trade secrets have been misappropriated" (Mot. for Expedited Discovery at 5.)

To qualify as a trade secret under the Uniform Trade Secrets Act, the information must be “a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” Wash. Rev. Code § 19.108.010(4); *see also Ed Nowogroski Ins. v. Rucker*, 944 P.2d 1093, 1096 (Wash. Ct. App. 1997), *aff’d*, 971 P.2d 936 (Wash. 1999). For a misappropriation of trade secrets claim to survive a motion to dismiss, “it is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets.” *Thermal Zone Prods. Corp. v. Echo Eng’g, Ltd.*, No. 93-C-0556, 1993 WL 358148, *5 (N.D. Ill. Sept. 14, 1993) (dismissing a UTSA claim) (quoting *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992)). While a complaint obviously need not provide so much information that the details of the purported trade secret would be disclosed to the public, a plaintiff must do more than invoke the term “trade secret.” *Thermal Zone*, 1993 WL 358148, at *5.

But that is precisely what Sendo has done here. The only allegation in the Complaint about the trade secrets at issue is that Microsoft misappropriated “a number of trade secrets relating to [Sendo’s] operation of a mobile phone development and manufacturing business.” (Compl. ¶ 51; *see also* ¶¶ 16, 17, 37, 44 (using term “trade secret”).) Beyond this bald allegation, Sendo provides no information whatsoever about the nature of the allegedly misappropriated trade secrets, and instead leaves Microsoft (and this Court) to speculate about the subject of Sendo’s claims.

The minimal specificity requirements of the Federal Rules of Civil Procedure should not be a difficult burden for Sendo to satisfy, as Sendo (more than anyone else) should be

acutely aware of the particular facts surrounding its purported trade secrets, whatever they are. Although Sendo unquestionably has had access to the HTC and Compal Smartphones, which are available on the market today, it has failed to identify any trade secrets in the those Smartphones that even arguably belongs to it. Sendo's failure to identify the allegedly misappropriated trade secrets speaks volumes about the merits of its claims and lays bare its true purpose in initiating this litigation: to gain access to the intellectual property and trade secrets of its competitors. Sendo has branded Microsoft a "thief" but has not disclosed what (if anything) was "stolen." This Court should dismiss Sendo's misappropriation claims.

V. The Uniform Trade Secrets Act Preempts Sendo's Common Law Misappropriation, Conversion, Unfair Competition, Breach Of Fiduciary Duty, And Tortious Interference Claims.

In Count I of its Complaint, Sendo alleges that Microsoft misappropriated one or more unidentified Sendo "trade secrets" and used them to its competitive advantage. Not content with this single claim, Sendo piles on a litany of duplicative claims for common law misappropriation (Count II), conversion (Count III), unfair competition (Count IV), breach of fiduciary duty (Count VI), and tortious interference (Count X). Sendo does this even though it is clear that the Uniform Trade Secrets Act ("UTSA"), which Washington and at least 43 other states⁶ have adopted, preempts those claims. This Court should dismiss those claims.

The UTSA "maintain[s] and promote[s] standards of commercial ethics and fair dealing in protecting [trade] secrets." *Ed Nowogroski*, 971 P.2d at 942. To rectify the uneven development of trade secret law in various states, and to promote a uniform national business environment, the UTSA is the sole source of civil liability for the misappropriation of trade secrets. *See Reingold v. Swiftships, Inc.*, 210 F.3d 320, 322 (5th Cir. 2000). All related common

⁶ As of July 2002, 43 states and the District of Columbia had adopted the UTSA. *See* Roger M. Milgrim, *Milgrim on Trade Secrets* § 1.01[2][b], at pp. 1-38 – 1-40.1 (2002).

law claims are preempted, as the UTSA “displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.” Wash. Rev. Code § 19.108.900(1). Under this provision, a party “may not rely on acts that constitute trade secret misappropriation to support other causes of action.” *Ed Nowogroski Ins.*, 944 P.2d at 1097. Sendo’s complaint, however, relies on trade secret misappropriation allegations to support several non-UTSA claims.

- *Common Law Misappropriation.* In its (statutory) misappropriation claim (Count I), Sendo alleges that it developed unspecified “trade secrets” related to “mobile telephone development and manufacturing” and that Microsoft “used” or “disclosed” those trade secrets to Sendo’s competitive detriment. (Compl. ¶¶ 50-54.) In its common law misappropriation claim, which incorporates the allegations of the (statutory) misappropriation claim, Sendo alleges that it developed unspecified “confidential and proprietary information” related to “mobile telephone manufacturing” and that Microsoft “used” that information to Sendo’s competitive detriment. (Compl. ¶¶ 55-57.) Beneath the flimsy disguise of slightly different wording, the common law misappropriation claim is “no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation.” *Powell Prods., Inc. v. Marks*, 948 F. Supp. 1469, 1474 (D. Colo. 1996); *see also Auto Channel v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 788-89 (W.D. Ky. 2001) (dismissing a common law misappropriation claim on ground that the UTSA “replaces other law relating to the misappropriation of trade secrets”); *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102, 1106 n.2 (D. Kan. 2000) (same); *Mushroom Tray Research Group, LLC v. Nobile*, No. 990173380S, 2000 WL 1023448 (Super. Ct. Conn. April 28, 2000) (same); *Paint Brush Corp. v. Neu*, 599 N.W.2d 384, 393 n.7 (S.D. 1999) (“The UTSA

displaces tort remedies that conflict with the act, such as the common law action for the misappropriation of a trade secret.”). This Court should dismiss that claim.

- *Conversion.* In its conversion claim (Count III), Sendo incorporates the allegations of the statutory misappropriation claim and common law misappropriation claim and alleges that Microsoft is in possession of Sendo’s “confidential information” and “trade secrets,” which Microsoft is “using . . . in direct competition with Sendo.” (Compl. ¶ 59-60.) Once again, the UTSA preempts this claim because it is “no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation.” *Powell Products*, 948 F. Supp. at 1474; *see also Penalty Kick Mgmt., Ltd. v. Coca Cola*, No. 01-12012, 2003 WL 164280, at *9-10 (11th Cir. Jan. 24, 2003) (holding that the UTSA preempts conversion claims premised on misappropriation); *Thomas & Betts Corp. v. Panduit Corp.*, 108 F. Supp. 2d 968, 973 (N.D. Ill. 2000) (same).

- *Unfair Competition.* In Count IV, Sendo incorporates all of its other trade secret misappropriation claims and alleges that Microsoft acquired “confidential and trade secret information,” which it is using to Sendo’s competitive detriment. (Compl. ¶¶ 61-63.) For the third time, Sendo has done nothing more than re-caption an allegation of trade secret misappropriation. This Court should dismiss Sendo’s unfair competition claim. *See, e.g., Composite Marine Propellers*, 962 F.2d at 1265 (holding that the UTSA preempts an unfair competition claim); *Allegiance Healthcare Corp. v. Coleman*, 232 F. Supp. 2d 1329, 1335-36 (S.D. Fla. 2002) (same); *United Magazine Co. v. Murdoch Magazines Distrib.*, 146 F. Supp. 2d 385, 409-10 (S.D.N.Y. 2001) (same); *Coulter Corp. v. Leinert*, 869 F. Supp. 732, 734-35 (E.D. Mo. 1994); *Powell Prods., Inc.*, 948 F. Supp. at 1476 (holding that an unfair competition claim is essentially a claim that the defendant stole the plaintiff’s trade secret); *Hutchison v. KFC Corp.*,

809 F. Supp. 68, 71-72 (D. Nev. 1992) (holding that the UTSA preempts an unfair competition claim).

- *Breach of Fiduciary Duty.* Sendo alleges in Count VI that Microsoft breached a fiduciary duty to Sendo by “obtain[ing] a blueprint of Sendo’s mobile telephone manufacturing business, technical knowledge and operator information” and “us[ing] . . . Sendo’s confidential proprietary information” to “Sendo’s detriment.” (Compl. ¶ 71.) “The issue is whether [plaintiff] alleges that [defendant] breached a duty — however that duty may have arisen — by misappropriating the . . . technology. If yes, the claim is preempted.” *Thermodyne Food Serv. Prods., Inc. v. McDonald’s Corp.*, 940 F. Supp. 1300, 1309 (N.D. Ill. 1996); *see also Composite Marine Propellers*, 962 F.2d at 1265 (holding that the UTSA preempts claim for breach of fiduciary duty); *S&S Computers and Design, Inc. v. Paycom Billing Servs., Inc.*, 2001 WL 515260, at *3 (W.D. Va. Apr. 5, 2001) (same); *Frantz v. Johnson*, 999 P.2d 351, 357-58 (Nev. 2000). Because Sendo is alleging that Microsoft breached its fiduciary duty by allegedly misappropriating Sendo’s trade secrets, this Court should dismiss Sendo’s breach of fiduciary duty claim.

- *Tortious Interference.* Sendo’s tortious interference claim (Count X) incorporates the other four trade secret misappropriation claims and alleges that Microsoft’s “foregoing acts” have interfered with Sendo’s existing and prospective business relationships. (Compl. ¶ 82.) These “foregoing acts” consist of the allegation that Microsoft “provided Sendo’s proprietary hardware expertise and trade secrets to low cost original equipment manufacturers.” (Compl. ¶ 16; *see also* ¶ 48 (“Microsoft disclosed to HTC and other low cost OEM[s] some or all of the confidential information and trade secrets it had acquired from Sendo”).) Sendo apparently contends that Microsoft interfered with Sendo’s business relationships by

misappropriating Sendo's trade secrets and using them to develop a Smartphone with another manufacturer, thus permitting the rival manufacturer to beat Sendo to market.

This is, yet one more time, nothing more than a restatement of the allegation in Count I that Microsoft misappropriated Sendo's trade secrets and used them to its own competitive advantage. As such, the UTSA preempts this claim. *See, e.g., Thomas & Betts Corp.*, 108 F. Supp. 2d at 974 (holding that the UTSA preempts the plaintiff's "claims that defendants tortiously interfered with [its] relationships with its customers by engaging in a misappropriation" of trade secrets); *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 2d 398, 413 (N.D. Ill. 2001); *Microbix Biosystems, Inc. v. BioWhittaker, Inc.*, 172 F. Supp. 2d 665, 668 n.3 (D. Md. 2000); *Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.*, 132 F. Supp. 2d 643, 648 (N.D. Ill. 2001), *rev'd in part and remanded on other grounds*, 285 F.3d 1353 (Fed. Cir. 2002) (holding that the UTSA preempts a cause of action for tortious interference based "squarely on a misappropriation of trade secrets"). This Court should dismiss Sendo's tortious interference claim.

VI. Sendo's Civil Conspiracy Claim Asserts That Microsoft Conspired With Itself.

Perhaps the claim that most openly exposes Sendo's attempt to transform this routine breach of contract case into something sinister is the one for "civil conspiracy," in which it alleges that Microsoft Corporation and its two wholly-owned subsidiaries, Microsoft Capital and Microsoft Licensing, conspired to misappropriate Sendo's trade secrets. (Compl. ¶ 76-78.) Had Sendo undertaken even a modicum of legal research before asserting this claim, it would have quickly discovered that a civil conspiracy involves an agreement "by two or more persons" to accomplish an unlawful purpose, *Herrington v. Hawthorne*, 47 P.3d 567, 575 (Wash. Ct. App. 2002), and that a corporation cannot, as a matter of law, conspire with its wholly-controlled subsidiaries. As the Washington Supreme Court observed in precluding the possibility of

establishing a conspiracy between a parent corporation and its wholly-controlled subsidiary, “[i]t is difficult, or impossible, to conceive of a parent corporation and its subsidiary entering into an agreement to accomplish any purpose — let alone an unlawful one.” *Corbit v. J. I. Case Co.*, 424 P.2d 290, 295 n.3 (Wash. 1967). This rule is so well established as to be beyond dispute. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (holding that a wholly-owned subsidiary cannot conspire with its parent to violate § 1 of the Sherman Act); *Pizza Mgmt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1166 (D. Kan. 1990) (observing that “[e]ven without the cogent reasoning of the Supreme Court in *Copperweld*, courts have rejected the possibility of a parent corporation tortiously conspiring with its wholly owned subsidiary.”) (citing cases); *Okusami v. Psychiatric Inst. of Washington*, 959 F.2d 1062, 1066-67 (D.C. Cir. 1992) (same); *Laxalt v. McClatchy*, 622 F. Supp. 737, 745-46 (D. Nev. 1985) (same, citing *Corbit*).

In short, Microsoft Corporation and its two wholly-owned subsidiaries cannot conspire with one another. This Court should dismiss Sendo’s civil conspiracy claim.

VII. Sendo Fails To Allege A Fiduciary Relationship With Microsoft, And Allegations In The Complaint And Provisions Of The Contracts Disprove Any Contention Of Fiduciary Liability.

Sendo’s breach of fiduciary duty claim (Count VI) asserts that “[a] confidential fiduciary relationship existed between Microsoft and Sendo as a result of the parties’ business relationship and course of dealing, certain contractual agreements executed by the parties, and placement of Microsoft’s employee/representative, Marc Brown, on the Sendo board of directors.” (Compl. ¶ 71.) This allegation utterly fails to state a claim for breach of fiduciary duty. Parties to ordinary commercial contracts are not in a fiduciary relationship, and nothing in Sendo’s Complaint indicates that Microsoft took on a duty to act primarily for Sendo’s benefit.

Perhaps more to the point, the allegations of the Complaint and provisions of the contracts affirmatively demonstrate that Microsoft took on no such duty. This Court should dismiss Sendo's breach of fiduciary duty claim.

"A fiduciary is a person with a duty to act *primarily for the benefit of another*." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 935 P.2d 628, 634 (Wash. Ct. App. 1997) (internal quotation omitted). To establish a fiduciary relationship, "the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party." *Id.* Sendo must, in other words, show that it "justifiably expects [its] welfare to be cared for" by Microsoft. *Id.*; see also *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 40 P.3d 1206, 1917 (Wash. Ct. App. 2002). Parties to a "garden variety, arms-length contractual relationship" do not owe one another fiduciary duties. *Stinnett v. Colorado Interstate Gas Co.*, 227 F.3d 247, 253 (5th Cir. 2000); see also *Ishibashi v. Gonzaga Univ.*, No. 25454-9-II, 2000 WL 1156899, at *5 (Wash. Ct. App. Aug. 11, 2000).

Sendo's Complaint does not contain a single allegation to support its contention that Microsoft took on a duty to act primarily for Sendo's benefit. In fact, Sendo never asserts that its relationship with Microsoft was anything other than a "garden variety, arms-length contractual relationship." The Complaint relies instead on bald allegations of a "fiduciary relationship" and "fiduciary capacity." (Compl. ¶¶ 37, 39.) "Plaintiffs' conclusory assertions that a fiduciary duty was owed . . . cannot survive a motion to dismiss." *Cooper v. Sony Records Int'l*, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2001).

Not only does Sendo fail to make any allegations that could possibly support its claim of breach of fiduciary duty, allegations in its Complaint and provisions of the contracts show conclusively that no fiduciary relationship existed. First and foremost, Sendo was not a

company with a “dependency” that needed Microsoft’s advice, counsel, and protection. On the contrary, Sendo was “made up of able and experienced former employees of such established mobile phone manufacturers as Phillips, Motorola and Nokia [who] had substantial experience” with the technology of mobile telephone handsets, their operating systems, the mobile telephone carriers, the carriers’ technical requirements, and the next generation mobile phone market. (Compl. ¶¶ 13, 14.) Microsoft, by contrast, had “little or no experience” in these areas. (Compl. ¶ 13.) Microsoft cannot possibly owe Sendo any fiduciary duty under these circumstances. *See Goodyear*, 935 P.2d at 634 (“Moreover, [the plaintiff] was experienced in the management of tire stores. He was capable of rejecting [the defendant’s] advice and exercising his own judgment about business matters.”) And while Microsoft is a larger company than Sendo (Compl. ¶ 16), “[t]hat disparity . . . cannot form the basis for this court to grant [Sendo] the special protection of a fiduciary relationship. *Id.*

Sendo also alleges that the SDMA gives Microsoft every incentive to see Sendo fail, the exact opposite of the dynamic necessary to create a fiduciary relationship. “Under the SDMA, in the event of a Sendo bankruptcy, Microsoft would obtain an irrevocable royalty free license to use Sendo’s Z100 intellectual property, including rights to make, use, or copy the Sendo Smartphone to create other Smartphones and to, most importantly for Microsoft[,] sublicense those rights to third parties.” (Compl. ¶ 27.) If Sendo believed that Microsoft’s incentive under the SDMA was to make Sendo fail, then Sendo could not possibly “justifiably expect[] [its] welfare to be cared for” by Microsoft. *Id.* The SDMA also specifically disclaimed that Microsoft’s and Sendo’s relationship was a “partnership, joint venture or agency relationship” (SDMA § 16.3), three relationships traditionally giving rise to fiduciary duties.

See, e.g., Noel v. Johnson, No. 24005-0-III, 2000 WL 1335304, at *6 (Wash. Ct. App. Sept. 15, 2000).

In addition, Sendo's OEM competitors were building Smartphones based on Microsoft's software at the same time Sendo was. (Compl. ¶ 43 ("On or about October 22, 2002, Microsoft and Orange SA . . . unveiled a . . . Smartphone . . . manufactured by High Tech Computer ('HTC'), a Taiwanese OEM.") There was nothing at all improper about Microsoft's software being used by HTC or any other OEM. In fact, the Shareholders' Agreement acknowledged that Microsoft's software could be used by Sendo's competitors: "Nothing . . . shall prevent Microsoft . . . from entering into agreements or commercial arrangements with third parties (including any person whose business is similar to or competes with [Sendo])." (Shareholders' Agreement § 2.2.) This "reservation of the right to compete" in a contract between Microsoft and Sendo is completely "at odds with a fiduciary relationship." *Goodyear*, 935 P.2d at 634.

Finally, Sendo places special emphasis on Microsoft's seat on Sendo's board of directors, which is a standard arrangement when one company makes a substantial investment in another. For all of the reasons stated above, Sendo could not justifiably have viewed Microsoft's Director, Marc Brown, as a fiduciary who would act primarily for Sendo's benefit. The Shareholders' Agreement even acknowledged that there could be conflicts of interest between Sendo and Microsoft's director:

A majority of the Board of the Company [Sendo] shall be entitled to exclude the Microsoft Director . . . where and to the extent that such majority determines, in good faith, that the presence of the Microsoft Director . . . would inhibit deliberations of the Board because of a conflict of interest between the Company and Microsoft . . . to the extent that the deliberations relate to a transaction with[,] or the Company's competitive strategy against[,] any business in which . . . Microsoft . . . has appointed a

person to the board of directors . . . or where it owns or controls twenty-five (25) per cent or more of such business.

(SDMA § 4.17.) The related Non-Executive Directorship (“NED,” attached as Ex. A) agreement required Microsoft’s director to notify Sendo if he accepted a position as a director or observer on the board of directors of one of Sendo’s competitors (NED § 5), obviously so Sendo could consider whether to exclude him from certain board of directors meetings. The parties clearly contemplated that both Microsoft and its director could be working on Smartphone software for Sendo’s competitors, and they took appropriate measures to address this fact. Under these circumstances, it is preposterous for Sendo to suggest that it had a fiduciary relationship with Microsoft. This Court should dismiss Sendo’s breach of fiduciary duty claim.


VIII. Sendo’s Punitive Damages Count Cannot Stand.

Consistent with its tendency toward overkill and redundancy, Sendo not only includes a request for punitive damages in its prayer for relief (Compl. ¶ 8), it tacks on a separate cause of action for “Punitive Damages.” (Compl. ¶¶ 84-85 (Count XI).) Sendo did so in contravention of the well-established rule that “[a] claim for punitive damages cannot stand as a separate cause of action, since it merely constitutes an element of recovery on the underlying cause of action.” 22 Am. Jur. 2d Damages § 741 (2000); *see also Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 604 (5th Cir. 1988) (“Punitive damages are not an independent claim or cause of action, but are a remedy available in various causes of action.”). This Court should dismiss Sendo’s punitive damages claim and should also, if it grants this Motion (leaving only Sendo’s breach of contract claim), dismiss Sendo’s request for punitive damages.

CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that this Court grant its Motion to Dismiss all but the breach of contract count of Sendo's Complaint.

Respectfully submitted,

By: 
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CERTIFICATE OF SERVICE
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I hereby certify that a true and correct copy of the above and foregoing document has been provided to all known counsel of record as indicated below, on the 3rd day of February, 2003.

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